180 (3)

No. 10-1017

In The
Supreme Court of the United States

BRICE M. GEORGE,
ROBERT STEVENSON, and IVORY GRACE,

Petitioners,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari
To The Louisiana Fourth Circuit Court Of Appeal

BRIEF IN OPPOSITION

LEON A. CANNIZZARO, JR.
Orleans Parish District Attorney
DONNA RAU ANDRIEU
Counsel of Record
Chief of Appeals
DONALD G. CASSELS, III
Law Clerk
ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE
619 South White Street
New Orleans, LA 70119
(504) 822-2414
dandrieu@orleansda.com

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether this Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), prohibits the use of a prior adult misdemeanor conviction as a predicate to a conviction for a recidivist felony.

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. The Petitioners' Cases Are Not in a Posture to Raise the Question Presented 4

II. It Is Not Necessary for This Court to Grant Certiorari Because This Court Has Already Articulated a Clear Constitutional Standard that Permits the Use of Prior Convictions to Enhance Penalties for Recidivist Defendants 7

A. This Court Has Disposed of the Question Reserved in *Blanton* 7

B. The Petitioners' Arguments Are the Result of Their Misunderstanding of the Jurisprudence of This Court 13

III. It Is Not Necessary for This Court to Grant Certiorari Because There Is No Circuit Split Meriting the Review of This Court 21

IV. It Is Not Necessary for This Court to Grant Certiorari Because the Law of Louisiana Affords Greater Protection to Criminal Defendants than the Jurisprudence of This Court Requires 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES:

Almendarez-Torres v. United States, 523 U.S. 224 (1998) ..... *passim*

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... *passim*

Baldwin v. New York, 399 U.S. 66 (1970) 9, 26

Blakely v. Washington, 542 U.S. 296 (2004) 10, 13

Blanton v. N. Las Vegas, 489 U.S. 538 (1989) 7, 8, 9, 18

Boykin v. Alabama, 395 U.S. 238 (1969) 5

Duncan v. Louisiana, 391 U.S. 145 (1968) 17

Graham v. Florida, 130 S. Ct. 2011 (2010) 24, 25

Harris v. United States, 536 U.S. 545 (2002) 13

In re Winship, 397 U.S. 358 (1970) 6, 10

Jones v. United States, 526 U.S. 227 (1999) ..... *passim*

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) 22, 24

Schriro v. Summerlin, 542 U.S. 348 (2004) 13

State v. Crosby, 338 So. 2d 584 (La. 1976) 1, 2

State v. George et al., 34 So. 3d 941 (La. App. 4th Cir. 03/10/10) 3

State v. George et al., 50 So. 3d 813 (La. 11/05/10) 3

State v. Hardy, 141 So. 27 (La. 1932) 27

State v. Lee, 364 So. 2d 1024 (La. 1980) 27

State v. Valentine, 397 So. 2d 1299 (La. 1981) 27

TABLE OF AUTHORITIES – Continued

Page

State v. Westbrook, 392 So. 2d 1043 (La. 1980) 27

United States v. Booker, 543 U.S. 220 (2005) 10, 13

United States v. Cotton, 535 U.S. 625 (2002) 13

United States v. Tighe, 266 F.3d 1187 (9th Cir. 2001) 21, 22, 25

Ward v. Village of Monroeville, 409 U.S. 57 (1972) 6

Washington v. Recuenco, 548 U.S. 212 (2006) 13

STATUTES:

18 U.S.C. § 924(c) 22

LA. REV. STAT. 40:966(E)(1) 1, 2, 3

LA. REV. STAT. 40:966(E)(2) 26

LA. REV. STAT. 40:966(E)(3) 1, 2, 3, 26

OTHER AUTHORITIES:

17 LA. CIV. L. TREATISE, *Criminal Jury Instructions* §§ 3.04, 3.11 (2d ed. 2011) 27

STATEMENT OF THE CASE

Petitioner Brice M. George has pleaded guilty on two occasions in the Criminal District Court for the Parish of Orleans to violation of LA. REV. STAT. 40:966(E)(1), possession of marijuana, first offense.[1] On the basis of those predicate convictions, the State charged him with a violation of LA. REV. STAT. 40:966(E)(3), possession of marijuana, third offense, a charge to which he initially pleaded not guilty. On May 30, 2008, the district court heard and denied George's motion to quash the bill of information. On June 30, 2008, the State amended the bill to charge George with possession of marijuana, second offense. The same day, George withdrew his prior plea and pleaded guilty to the amended bill, reserving his right under *State v. Crosby*, 338 So. 2d 584 (La. 1976), to appeal the district court's denial of his motion to quash. George waived all delays, and the district court sentenced him to two years at hard labor, suspended, and placed him on two years' active probation. The district court then granted his motion for appeal.

Petitioner Robert Stevenson has pleaded guilty on three occasions in the Criminal District Court for the Parish of Orleans to violation of LA. REV. STAT. 40:966(E)(1), possession of marijuana, first offense.[2]

---

[1] No. 466-941 (conviction entered 3/29/07); No. 470-511 (conviction entered 8/23/07).

[2] No. 391-755 (conviction entered 9/22/97); No. 450-190 (conviction entered 7/29/04); No. 476-042 (conviction entered 6/26/08).

On the basis of those predicate convictions, the State charged him with a violation of LA. REV. STAT. 40:966(E)(3), possession of marijuana, third offense. On June 26, 2008, the district court heard and denied Stevenson's motion to quash the bill of information. The same day, Stevenson pleaded guilty as charged, reserving his right under *State v. Crosby*, 338 So. 2d 584 (La. 1976), to appeal the district court's denial of his motion to quash. Stevenson waived all delays, and the district court sentenced him to two years at hard labor, suspended, and placed him on two years' active probation. The district court then granted his motion for appeal.

Petitioner Ivory Grace has pleaded guilty on three occasions in the Criminal District Court for the Parish of Orleans to violation of LA. REV. STAT. 40:966(E)(1), possession of marijuana, first offense.[3] On the basis of those predicate convictions, the State charged him with a violation of LA. REV. STAT. 40:966(E)(3), possession of marijuana, third offense, a charge to which he initially pleaded not guilty. On January 29, 2009, the district court heard and denied Grace's motion to quash the bill of information. On March 4, 2009, Grace withdrew his prior plea and pleaded guilty as charged, reserving his right under *State v. Crosby*, 338 So. 2d 584 (La. 1976), to appeal the district court's denial of his motion to quash.

---

[3] No. 471-590 (conviction entered 10/11/07); No. 477-452 (conviction entered 6/10/08); No. 482-849 (conviction entered 3/4/09).

The district court sentenced him on March 20, 2009, to serve one year at hard labor. The district court then granted his motion for appeal.

The petitioners appealed to the Louisiana Fourth Circuit Court of Appeal where their appeals were consolidated.[4] The Louisiana Fourth Circuit affirmed. *See State v. George et al.*, 34 So. 3d 941 (La. App. 4th Cir. 03/10/10). The petitioners applied for writ of certiorari to the Supreme Court of Louisiana.[5] That application was summarily denied. *See State v. George et al.*, 50 So. 3d 813 (La. 11/05/10). From that denial, the petitioners now apply to this Court for writ of certiorari.

REASONS FOR DENYING THE WRIT

The petitioners, on several occasions, pleaded guilty to violation of LA. REV. STAT. 40:966(E)(1), possession of marijuana, first offense – a petty misdemeanor to which no right to trial by jury attaches. The petitioners each subsequently pleaded guilty to violation of LA. REV. STAT. 40:966(E)(3), possession of marijuana, third offense – a felony to which the right to trial by jury does attach. The petitioners' central claim is that, because their felony convictions are predicated upon their misdemeanor convictions, their

[4] No. 2008-KA-1193 (Brice M. George); No. 2008-KA-1338 (Robert Stevenson); No. 2009-KA-0867 (Ivory Grace).

[5] No. 2010-K-0812.

felony convictions violate the Sixth Amendment's requirement that every element of the crime charged be proven to a jury beyond a reasonable doubt. For the reasons that follow, that claim is both procedurally and substantively flawed.

I. The Petitioners' Cases Are Not in a Posture to Raise the Question Presented.

The petitioners assert that their "cases do not suffer from any vehicle problems." (Pet. at 35.) Similarly, the petitioners' *amicus curiae*, the National Association of Criminal Defense Attorneys (NACDL), asserts that "[t]hese cases are an ideal vehicle for clarifying the boundaries of *Almendarez-Torres* and *Apprendi*." (NACDL Brief at 17.) Those assertions are at odds with fact.

A plea of guilty is a conviction that effects a waiver both of constitutional rights and any arguments that may have been raised as the derogation of those rights:

> A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment . . . . Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth.

> *Malloy v. Hogan*, 378 U.S. 1 (1964). Second, is the right to trial by jury. *Duncan v. Louisiana*, 391 U.S. 145 (1968). Third, is the right to confront one's accusers. *Pointer v. Texas*, 380 U.S. 400 (1965).

Boykin v. Alabama, 395 U.S. 238, 242 (1969). Thus, speculative arguments about what constitutional protections might have been violated had the proceedings continued are foreclosed by the plea that terminated those proceedings.

Here, each of the petitioners pleaded guilty at least twice to possession of marijuana, first offense – the predicates to their subsequent convictions for possession of marijuana, third offense. The petitioners do not claim that there were any constitutional infirmities in those proceedings.[6] Whatever constitutional

---

[6] Although the petitioners do not claim that there were any constitutional infirmities in the proceedings that resulted in their pleas as to possession of marijuana, first offense, they do make several generic arguments about similar proceedings:

> As in other large municipalities, the burden of processing this large number of offenses means that the proceedings for the non-jury eligible marijuana possession charge are cursory and the local public defender simply cannot thoroughly investigate each case as thoroughly as if the case carried a significant term of imprisonment. Nor are these courts able to carefully adjudicate each individual case. These initial charges are literally regarded as "petty" offenses, with any number of defendants pleading guilty simply to receive time-served and secure a release until such time as [the] prosecutor decides to elevate the offense based upon the prior adjudications to a serious felony offense.

(Continued on following page)

protections might have attached to the proceedings, but for the petitioners' pleas, were therefore waived. Accordingly, the petitioners' cases are not in a posture to raise the question presented in their petition, and their petition is therefore a flawed vehicle.

> As Judge Posner notes, . . . judges assigned to preside over these misdemeanor cases "hear the same stories from defendants over and over again, leading them to treat defendants' testimony with skepticism; they become chummy with the police and apply a lower standard of scrutiny to the testimony of officers whom they have come to trust; and they make their decision alone rather than as a group and so their decisions lack the benefits of group deliberation." Facing a skeptical and overburdened trial judge, under-resourced lawyer, and no opportunity to be judged by one's peers, and the possibility of spending six months in jail (versus going home with a guilty plea), many defendants choose the latter.

(Pet. at 37 (quoting *Welch v. United States*, 604 F.3d 408, 432 (7th Cir. 2010) (Posner, J., dissenting)).) However, those arguments are flawed for several reasons. First, they lack citation to any form of authority for their factual assertions. Second, the petitioners do not claim and there is no evidence to support a claim that they received ineffective assistance of counsel with respect to the proceedings as to the convictions for possession of marijuana, first offense; absent such a claim and evidence to support it, the petitioners' arguments in this regard are of no moment. Third, the petitioners do not claim and there is no evidence to support a claim that they were at any time denied their right to a fair and impartial judge under *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), or their right to have all facts relevant to their guilt found beyond a reasonable doubt under *In re Winship*, 397 U.S. 358 (1970); absent such claims and evidence to support them, the petitioners' arguments in this regard are innuendo, not argument.

II. It Is Not Necessary for This Court to Grant Certiorari Because This Court Has Already Articulated a Clear Constitutional Standard that Permits the Use of Prior Convictions to Enhance Penalties for Recidivist Defendants.

The petitioners advance two substantive arguments regarding the jurisprudence of this Court: First, the petitioners argue that this Court has left open the question of "whether a repeat offender facing enhanced penalties may state a constitutional claim because of the absence of an opportunity for a jury trial in a prior . . . prosecution." (Pet. at 5.) Second, the petitioners argue that the jurisprudence of this Court favors their suggested resolution of that question. (*See, e.g.*, Pet. at 18, 21, 23.) Those arguments are without merit. First, this Court has disposed of the question reserved in *Blanton v. N. Las Vegas*, 489 U.S. 538 (1989). Second, the position taken by the petitioners is inconsistent with the jurisprudence of this Court.

A. This Court Has Disposed of the Question Reserved in *Blanton*.

The petitioners claim that this Court has left open the question of "whether a repeat offender facing enhanced penalties may state a constitutional claim because of the absence of an opportunity for a jury trial in a prior . . . prosecution." (Pet. at 5 (quoting *Blanton*, 489 U.S. at 545 n.12) (internal quotation marks and alterations omitted).) In support of that

argument, the petitioners rely on the following cases: *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In *Blanton*, this Court was confronted with the question of "whether there is a constitutional right to a trial by jury for persons charged under Nevada law with driving under the influence of alcohol (DUI)." 489 U.S. at 539. Holding that there is not, this Court explained:

> It has long been settled that "there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision." *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968); *see also District of Columbia v. Clawans*, 300 U.S. 617, 624 (1937); *Callan v. Wilson*, 127 U.S. 540, 557 (1888).

Blanton, 489 U.S. at 541. Declining to articulate an absolute definition of petty crimes or offenses, this Court noted:

> Although we did not hold in *Baldwin* that an offense carrying a maximum prison term of six months or less automatically qualifies as a "petty" offense, . . . we do find it appropriate to presume for purposes of the Sixth Amendment that society views such an offense as "petty." A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so

> severe that they clearly reflect a legislative determination that the offense in question is a "serious" one.

Id. at 543. Addressing the argument that a recidivist enhancement might be one such "additional statutory penalty," this Court countered that it "ascribe[d] little significance to the fact that a DUI offender faces increased penalties for repeat offenses" because "[r]ecidivist penalties of the magnitude imposed for DUI are commonplace. . . ."[7] *Id.* at 545.

---

[7] In making that statement, this Court was aware of the possible penalties to which a recidivist DUI offender would be exposed under Nevada law:

> A second DUI offense is punishable by 10 days to six months in prison. The second-time offender also must pay a fine ranging from $500 to $1,000, and he loses his driver's license for one year. A third-time DUI offense is punishable by a minimum term of one year's imprisonment and a maximum term of six years' imprisonment. The third offender also must pay from $2,000 to $5,000, and he loses his driving privileges for three years.

Blanton, 489 U.S. at 540 n.2 (citations omitted). Although a first DUI offense and a second DUI offense both appear to be misdemeanors, a third DUI offense would be a felony. *See Baldwin v. New York*, 399 U.S. 66 (1970). Despite knowledge of this statutory scheme, this Court still held that the Sixth Amendment did not confer a right to trial by jury on the petitioner for his first offense misdemeanor. In light of that holding, it is reasonable to infer that this Court tacitly approved the use of prior misdemeanor convictions as a constitutional predicate to subsequent felony charges.

Nine years later, in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), this Court was confronted with the question of whether, under a federal statute, recidivism constituted an element of a crime or a sentencing factor.[8] *See id.* at 228-29. Concluding that the latter interpretation was correct, this Court rested its decision on the history of recidivism as a sentencing factor:

> The sentencing factor at issue – recidivism – is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence . . . . Consistent with this tradition, the Court said long ago that a State need not allege a defendant's prior conviction in the indictment or information that alleges the elements of an underlying crime, even though the conviction was "necessary to bring the case within the statute" . . . . That conclusion followed, the Court said, from "*the distinct nature of the issue*," and the fact that recidivism "does not relate to the commission of the offense, *but goes to the punishment only*, and therefore . . . may be subsequently decided" . . . . The Court has

[8] At that time, under the Federal Sentencing Guidelines, a sentencing factor could be found by a judge by a preponderance of the evidence, whereas an element of the crime would, under *In re Winship*, 397 U.S. 358 (1970), have to be charged in the indictment and proven to a jury beyond a reasonable doubt. Since that time, this Court has held such a practice to be unconstitutional – except with respect to enhancement based upon a finding of recidivism. *See United States v. Booker*, 543 U.S. 220 (2005); *see also Blakely v. Washington*, 542 U.S. 296 (2004).

> not deviated from this view . . . . [T]o hold that the Constitution requires that recidivism be deemed an "element" of petitioner's offense would mark an abrupt departure from a longstanding tradition of treating recidivism as "go[ing] to the punishment only."

Almendarez-Torres, 523 U.S. at 230 (citations omitted).

In *Jones v. United States*, 526 U.S. 227 (1999), this Court was again confronted with the practical and constitutional distinction between "elements" and "sentencing factors" in the context of a federal statute. *Id.* at 232-33. Holding that the statute created three discrete offenses rather than one crime and two sentencing factors, this Court characterized its prior holding in *Almendarez-Torres* as "stand[ing] for the proposition that not every fact expanding a penalty range must be stated in a felony indictment, the precise holding being that recidivism increasing the maximum penalty need not be so charged" and noted that the holding in that case "rested in substantial part on the tradition of regarding recidivism as a sentencing factor, not as an element to be set out in the indictment." *Id.* at 248-49.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court was confronted with the question of whether a state judge could pronounce a sentence upon a convicted defendant beyond the statutorily prescribed maximum for the offense of his conviction based on the judge's finding by a preponderance of

the evidence that the crime had been motivated by hate.[9] Holding that such a practice was unconstitutional, this Court examined the recidivism exception it had created in *Almendarez-Torres* and expressly incorporated that exception into its holding:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. *Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *With that exception*, we endorse the statement of the rule set forth in the concurring opinions in [*Jones*]: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." [*Jones*,

---

[9] At that time, New Jersey had a "hate crime" statute that "provide[d] for an 'extended term' of imprisonment if the trial judge [found], by a preponderance of the evidence, that '[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" *Apprendi*, 530 U.S. at 468-69 (citing N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999-2000)).

> 526 U.S. at 252-53 (Stevens, J., concurring); *see also id.* at 253 (Scalia, J., concurring).]

Apprendi, 530 U.S. at 490 (emphasis added). That holding has been cited with approval by this Court in numerous subsequent cases, and there can be no reason to doubt that it is now a matter of settled law. *See Washington v. Recuenco*, 548 U.S. 212, 216 (2006); *United States v. Booker*, 543 U.S. 220, 231 (2005); *Blakely v. Washington*, 542 U.S. 296, 301 (2004); *Schriro v. Summerlin*, 542 U.S. 348, 250 (2004); *Harris v. United States*, 536 U.S. 545, 563 (2002); *United States v. Cotton*, 535 U.S. 625, 627 (2002). Accordingly, the petitioners' claim that this Court has left open the question of whether a repeat offender facing enhanced penalties may state a constitutional claim because of the absence of an opportunity for a jury trial in a prior prosecution is without merit.

B. The Petitioners' Arguments Are the Result of Their Misunderstanding of the Jurisprudence of This Court.

The petitioners assert, citing this Court's decision in *Jones*, that "every fact increasing the maximum penalty must be treated like an element of the offense: that is, the fact must be alleged in the indictment, and proven to a jury beyond a reasonable doubt." (Pet. at 12.) That statement is incomplete. What this Court stated in a footnote to its decision in *Jones* was that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (*other than prior*

conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[10] *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (emphasis added). That footnote subsequently became the predicate to this Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000):

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in [*Jones*]. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Id. at 490.

Despite the clarity of that statement, the petitioners argue that this Court implicitly excluded from the foregoing rule convictions for crimes such as

---

[10] The exception for prior convictions that this Court acknowledged in *Jones* was created by its prior holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Describing that holding in *Jones*, this Court stated that its decision in *Almendarez-Torres* stood for the proposition that "not every fact expanding a penalty range must be stated in a felony indictment, the precise holding being that recidivism increasing the maximum penalty need not be so charged." *Jones*, 526 U.S. at 248.

theirs. In support of that argument, the petitioners cite the following passage from *Jones*:

> One basis for that possible constitutional distinctiveness [between prior adult felony convictions and other facts] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. *Almendarez-Torres* cannot, then, be read to resolve the due process and Sixth Amendment questions implicated . . . as the Government urges.

(Pet. at 18-19 (quoting *Jones*, 526 U.S. at 249).) However, the petitioners' alterations to that passage distort its meaning. Unaltered, the passage reads as follows:

> One basis for that possible constitutional distinctiveness is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. *Almendarez-Torres* cannot, then, be read to resolve the due process and Sixth Amendment questions implicated by reading the carjacking statute as the Government urges.

Jones, 526 U.S. at 249. Comparison of these two versions lays bare three flaws in the petitioners' argument.

First, as can be discerned from the discussion in *Jones* that preceded the above-quoted passage, the "possible constitutional distinctiveness" to which this Court referred was the distinction between recidivism and other types of facts bearing upon sentencing – not "prior adult felony convictions":

> The [*Almendarez-Torres*] Court's repeated emphasis on the distinctive significance of recidivism leaves no question that the Court regarded that fact as potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing.

Id. at 249. Thus, the petitioners' insertion of the phrase "prior adult felony convictions" limits the express reasoning of this Court in a manner without support in the opinion itself.

Second, this Court noted that a possible basis for the distinctiveness between recidivism and other factors bearing upon sentencing is that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Id.* To that phrase, the petitioners ascribe the following meaning:

> Where prior adult felony convictions are concerned, at least the factual basis for the increase in the maximum punishment has already been determined in accord with the constitutional guarantees to notice, proof

> beyond a reasonable doubt, and the right to trial by jury.

(Pet. at 19.) Implicit in that gloss is the erroneous assumption that an adjudicatory proceeding for a misdemeanor – such as possession of marijuana, first offense – offends the Constitution because a magistrate rather than a jury is the finder of fact.[11] However, this Court has expressly held that the Sixth Amendment's jury trial guarantee is not absolute and may, in certain circumstances, be satisfied without the presence of a jury as fact-finder:

> [I]n the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. We would not assert, however, that every criminal trial – or any particular trial – held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.

Duncan v. Louisiana, 391 U.S. 145, 157-58 (1968). Moreover, this Court has held that the Sixth Amendment does not entitle a defendant to a jury in trials

---

[11] The petitioners make no substantive arguments that the practice of trials for possession of marijuana, first offense, runs afoul of the Sixth Amendment's notice requirement or the Fourteenth Amendment's requirement of proof beyond a reasonable doubt. *But see supra* note 6.

for petty offenses such as misdemeanors, *Blanton v. N. Las Vegas*, 489 U.S. 538, 543 (1989), even though a conviction issuing from such proceedings may become the predicate for a subsequent felony conviction. *Id.* at 544 ("We ascribe little significance to the fact that a DUI offender faces increased penalties for repeat offenses."). Thus, the petitioners' argument flows from a misunderstanding of the jury trial guarantee.

Third, this Court noted that procedural safeguards were but one possible basis upon which to justify the distinction between recidivism and other factors bearing upon sentencing. *Jones*, 526 U.S. at 249. The petitioners, however, mistake this sufficient condition for a necessary one. Had this Court believed that there could be no other basis to justify the distinction, it could simply have omitted the phrase "one possible basis." Instead, this Court chose to include the phrase, and its use should not be construed as mere surplusage. Moreover, it is the peculiar burden of a petitioner to identify the constitutional basis for his claim, yet the petitioners have failed to explore – let alone call into question – other potential bases for the distinction this Court has unquestionably espoused.

The petitioners next assert that this Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that "in any criminal prosecution where the Sixth Amendment right to trial by jury applies, any fact that the state seeks to use to increase the maximum penalty must be subject to the jury trial right and proven beyond a reasonable doubt." (Pet. at 19.) That

statement is incomplete. As this Court articulated its holding in *Apprendi*:

> *Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

530 U.S. at 490 (emphasis added).

Attempting to rationalize their omission of that incipit, the petitioners quote the following passage from *Apprendi*:

> Rejecting Almendarez-Torres' objection, we concluded that sentencing him to a term higher than that attached to the offense alleged in the indictment did not violate the strictures of *Winship* in that case. Because Almendarez-Torres had *admitted* the three earlier convictions for aggravated felonies – all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own – no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court.

(Pet. at 20-21 (quoting *Apprendi*, 530 U.S. at 488).) Although this Court italicized the word "admitted" in the above passage, the petitioners did not reproduce that textual emphasis in their brief, the effect of which is to distort the significance of the passage as a whole. The focus of the above passage was, as here it ought also to be, on the fact that the defendant's guilty

plea cured any procedural deficiencies that may have theoretically existed as to his prior convictions. As noted *supra* at Part I, the petitioners pleaded guilty in all of the proceedings that established the predicates supporting their current convictions. Moreover, although they reserved the right to appeal as to the narrow constitutional issue they claim to present, the petitioners also pleaded guilty to their current convictions. In light of the foregoing language from *Apprendi*, it is illogical to assert that some question concerning the petitioners' right to a jury trial exists, because, like the petitioner in *Almendarez-Torres*, they have *admitted* their earlier convictions as well as their present ones – all of which were entered pursuant to proceedings with substantial procedural safeguards of their own.

To summarize, the petitioners' arguments are the result of their misunderstanding of the jurisprudence of this Court: they have distorted through alteration and taken out of context the statements of this Court; they have incompletely stated the law; they have misunderstood the nature of the Sixth Amendment's jury trial guarantee; and they have mistaken a sufficient condition for a necessary one. Through these misunderstandings, they have failed to raise an issue meriting the review of this Court, and their petition should therefore be denied.

III. It Is Not Necessary for This Court to Grant Certiorari Because There Is No Circuit Split Meriting the Review of This Court.

In an attempt to attract the attention of this Court, the petitioners have invoked the claim that "[t]he federal appellate courts and state supreme courts are intractably split. . . ." (Pet. at 23.)[12] That claim is inaccurate. The Ninth Circuit, in its decision in *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001), stands alone in espousing the view of this Court's jurisprudence advocated by the petitioners, and that decision does not purport to address the narrow question presented here.

In *Tighe*, the Ninth Circuit held that convictions issuing from juvenile criminal proceedings may not,

---

[12] At first blush, this statement appears to suggest that there is division among both the federal courts of appeals and the state supreme courts. Further scrutiny of the petition reveals that such a suggestion was likely not what the petitioners intended. The petitioners have identified numerous state supreme courts that have interpreted the exception to the rule of *Apprendi* to embrace prior adult misdemeanor convictions. *See* (Pet. at 27 (citing *People v. Nguyen*, 209 P.3d 946 (Cal. 2009); *State v. Weber*, 149 P.3d 646 (Wash. 2006); *People v. Huber*, 139 P.3d 628 (Colo. 2006); *State v. McFee*, 721 N.W.2d 607 (Minn. 2006); *Ryle v. State*, 842 N.E.2d 320 (Ind. 2005); *State v. Hitt*, 42 P.3d 732 (Kan. 2002)).) In contrast, the petitioners have identified no state court to have held to the contrary. Accordingly, the State interprets this statement by the petitioners to refer to the split between the Ninth Circuit and all other federal and state appellate courts to have addressed the question presented here.

under this Court's holding in *Apprendi*, be used as "previous convictions" under the Armed Career Criminals Act, 18 U.S.C. § 924(e). 266 F.3d at 1194-95. In reaching that holding, the Ninth Circuit noted that there are "significant constitutional differences between adult convictions and juvenile adjudications."[13] *Id.* at 1192-93. The differences between adult convictions and juvenile adjudications are a result of the differing systems that produce them and the differing goals served by those systems. This Court articulated those differences in its decision in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971):

> [T]he juvenile court proceeding has not yet been held to be a "criminal prosecution," within the meaning and reach of the Sixth Amendment, and also has not yet been regarded as devoid of criminal aspects merely because it usually has been given the civil label.

Id. at 547. At issue in *McKeiver* was whether the Constitution entitles juveniles to trial by jury in

---

[13] In distinguishing between adult convictions and juvenile adjudications, the Ninth Circuit considered significant the fact that, under this Court's decision in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), there is no constitutional right to trial by jury in a juvenile proceeding. However, in arriving at its decision in *McKeiver*, this Court focused not on the Sixth Amendment's jury trial guarantee, but on striking a balance between Due Process and the jury's impact on "the juvenile court's assumed ability to function in a unique manner."

juvenile proceedings. Concluding that it does not, this Court stated:

> The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the fact-finding function, and would, contrarily, provide an attrition of the juvenile court's assumed ability to function in a unique manner. It would not remedy the defects of the system. Meager as has been the hoped-for advance in the juvenile field, the alternative would be regressive, would lose what has been gained, and would tend once again to place the juvenile squarely in the routine of the criminal process.
>
> . . .
>
> Concern about the inapplicability of exclusionary and other rules of evidence, about the juvenile court judge's possible awareness of the juvenile's prior record and of the contents of the social file; about repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers – all to the effect that this will create the likelihood of pre-judgment – chooses to ignore it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.
>
> If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but

> for the moment we are disinclined to give impetus to it.

Id. at 547-51.

That the juvenile and criminal courts maintain a separate existence reflects the differing goals they pursue. Those goals are, in turn, a reflection of fundamental differences between adults and juveniles. A recent decision by this Court, *Graham v. Florida*, 130 S. Ct. 2011 (2010), highlights the extent of those differences. In *Graham*, this Court was confronted with the question of whether the Eighth Amendment's prohibition of cruel and unusual punishments permitted a juvenile offender, tried as an adult in the criminal court system, to be sentenced to life in prison without parole for a nonhomicide crime. *Id.* at 2017-18. In holding that the Eighth Amendment did prohibit such a sentence, this Court rested its decision on the differences between juvenile and adult offenders:

> [B]ecause juveniles have lessened culpability they are less deserving of the most severe punishments. [*Roper v. Simmons*, 543 U.S. 551, 569 (2005).] As compared to adults, juveniles have a "'lack of maturity and an underdeveloped sense of responsibility'"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." *Id.* at 569-570. These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender

> whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 573. Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569. A juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult." [*Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)].

Graham, 130 S. Ct. at 2026.

Although the Ninth Circuit distinguished adult convictions from juvenile adjudications on the basis of this Court's holdings regarding the availability of a jury as to the former but not the latter, that distinction is but one manifestation of the fundamental differences between adults and juveniles and the courts that adjudicate them. Because the juvenile and criminal courts pursue different goals – goals rooted in the differences between the individuals they adjudicate – it is appropriate to distinguish between the adjudications of those courts. Accordingly, the Ninth Circuit's decision in *Tighe* should be limited to juvenile adjudications. That decision so limited, there exists no split meriting the review of this Court.

IV. It Is Not Necessary for This Court to Grant Certiorari Because the Law of Louisiana Affords Greater Protection to Criminal Defendants than the Jurisprudence of This Court Requires.

As discussed *supra* at Part II, under this Court's decision in *Apprendi*, the fact of a prior conviction, unlike other facts bearing upon sentencing, need not be presented to a jury and need not be proven beyond a reasonable doubt. Notwithstanding the fact that that rule declares constitutional the practice of permitting a judge to find by a preponderance of the evidence the fact of a defendant's prior convictions, Louisiana has chosen to deprive judges of such authority and confer it instead upon juries.

Both LA. REV. STAT. 40:966(E)(2), possession of marijuana, second offense, and LA. REV. STAT. 40:966(E)(3), possession of marijuana, third offense, make the predicate offense(s) upon which they are based an element of the crime charged. Both are felonies to which the Sixth Amendment right to trial by jury attaches. *See Baldwin v. New York*, 399 U.S. 66 (1970). Accordingly, in prosecutions for possession of marijuana, both second offense and third offense, the fact of a defendant's prior conviction(s) for possession of marijuana is submitted to a jury and must be proven beyond a reasonable doubt.

In Orleans Parish, where the petitioners were convicted, the evidence usually offered by the State to prove the fact of a defendant's prior conviction

consists of the following: a certified copy of the arrest register as to the defendant's prior conviction (bearing the defendant's fingerprints); a certified copy of court records as to the defendant's prior conviction (also bearing the defendant's fingerprints); a certified copy of the arrest register as to the crime presently charged (also bearing the defendant's fingerprints); and the testimony of a fingerprint expert to establish that all sets of fingerprints match.[14] However, even when such evidence is offered, a jury is free to disbelieve – or even disregard – that evidence and may instead find the defendant guilty of a lesser charge (generally, possession of marijuana, first offense) or not guilty. *See* 17 LA. CIV. L. TREATISE, *Criminal Jury Instructions* §§ 3.04, 3.11 (2d ed. 2011).

Moreover, because under Louisiana law a defendant's prior conviction for possession of marijuana is an element of the crimes of possession of marijuana, second offense and third offense, a defendant is permitted to challenge not only the fact but also the validity of his prior conviction by offering evidence

---

[14] Although this is the usual manner of proving prior convictions, others have been approved by the courts of Louisiana. *See, e.g., State v. Lee*, 364 So. 2d 1024, 1032 (La. 1980) (testimony by the defendant's previous attorney and parole officer); *State v. Hardy*, 141 So. 27 (La. 1932) (comparison of photograph to defendant's appearance); *State v. Westbrook*, 392 So. 2d 1043 (La. 1980) (defendant's identity established through comparison of name, sex, date of birth, and driver's license number); *State v. Valentine*, 397 So. 2d 1299 (La. 1981) (judicial notice that the defendant had previously been convicted in that judge's court).

that that conviction was obtained in error. The upshot of these procedural safeguards is that, whenever a defendant is charged with possession of marijuana, second offense or third offense, he is granted a de facto jury trial as to any prior offense. Thus, even if the petitioners' interpretation of this Court's jurisprudence were correct, the law of Louisiana would still accord all requisite procedural protections. Therefore, the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

LEON A. CANNIZZARO, JR.
Orleans Parish District Attorney
DONNA RAU ANDRIEU
Counsel of Record
Chief of Appeals
DONALD G. CASSELS, III
Law Clerk
ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE
619 South White Street
New Orleans, LA 70119
(504) 822-2414
dandrieu@orleansda.com

Counsel for Respondent